

Decision 88 12 047 DEC 9 1988

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation
into the constructive mileages and
related rules and provisions of all
highway carriers, relating to the
transportation of any and all
commodities between all points in
California (including, but not
limited to, constructive mileages
provided in the Distance Table).

And Related Matters.

Mailed

DEC 12 1988

Case 7024, OSH 40
(Filed May 16, 1984)

ORIGINAL

Case 5330, OSH 120
Case 5433, OSH 78
Case 5437, OSH 326
I.85-04-052

(See Decision 87-09-046 for appearances.)

Additional Appearances

John Adams, for TNT-Bestway; Larry E. Farrens,
for California Carriers Association; Frank
A. Fuentes, for Southwestern Portland
Cement Company; Gene Carmody, for himself;
Daniel W. Baker, Attorney at Law, for
himself; James R. Foote, for Associated
Independent Owner-Operators, Inc.; Gary E.
Haas, for himself; Joseph M. Harrison, for
Household Goods Carriers Bureau; Edward J.
Hegarty, Attorney at Law, for California
Moving & Storage Association and Frank C.
Alegre Trucking, Inc.; Philip E. Hendren,
for Rocky Mountain Motor Tariff Bureau,
Inc.; Douglas Hill, for California Moving
and Storage Association; Priscilla
Ladeira, for Rich Ladeira Trucking, Inc.;
James D. Martens, for California Dump Truck
Owners Association; Edward G. Poole,
Attorney at Law, for Skaff & Anderson;
Richard W. Smith, Attorney at Law, for
California Trucking Association; Leon H.
Carrington, for himself and Century
Business Systems, Inc.; William Vavens, for
Viking Freight System; and Laura L. De
Julio, for Riverside Cement; interested
parties.

INTERIM OPINION

This proceeding was commenced for the purpose of receiving evidence concerning appropriate methods of accomplishing changes in the mileages and rules named in Distance Table (DT) 8. DT 8 became effective on July 1, 1975, succeeding DT 7 pursuant to Decision (D-) 84332. DT 8 provides constructive mileages for use in connection with the application of distance rates named in Minimum Rate Tariffs (MRT) 3-A, 4-C and, to a limited extent, 7-A. It also applies in connection with transportation performed subject to General Orders (GO) 147-A (general commodities), 149 (trailer coaches), 150-A (cement), and 151 (truckaway).

The Commission directed that the proceeding be conducted in two phases. Phase I was limited to revisions reflecting changes which occurred since the issuance of DT 8. Phase II was to consider conversion of present Metropolitan Zones and Described Extended Areas to zones coextensive with United States Postal Service Zip Code Zones (Zip Code Zones).

After submission of Phase I we issued D.87-09-046, dated September 10, 1987. The decision established some new basing points but did not order any substantive changes to DT 8. It also expanded Phase II to include a review of the constructive mileage guide in the current transportation environment, and conversion of the DT to a zip code system for the entire state. On the final day of the Phase II hearings conducted on January 25, 1988, heard before Administrative Law Judge (ALJ) John Lemke, briefs were requested by April 15, 1988 on the following issues:

1. Whether to convert to actual miles and zip codes rather than constructive miles.
2. Whether to use an outside vendor on an RFP (Request For Proposal) basis, rather than the Commission staff maintaining/updating the mileage guide.

3. Whether the Public Utilities (PU) Code § 496 issues can be resolved if the Commission continues to be the issuer of the mileage guide, and the vendor merely the contractor who develops and updates the guide.
4. References in the record where testimony may be found to substantiate the statement contained in amended Staff Exhibit 12 that the motor carrier industry nationwide generally uses actual miles for distance rates.

Phase II was submitted with the filing of briefs on April 15, 1988.

Briefs were filed by California Moving and Storage Association (CMSA), California Trucking Association (CTA), Con-Way Western Express, Inc. (Con-Way), Household Goods Carriers' Bureau, Inc. (HGCB), the Commission's Transportation Division Staff (staff), Traffic Managers Conference of California (TMC), Viking Freight System, Inc. (Viking) and Willig Freight Lines (Willig). The comments of the parties on the various issues are essentially as follows:

Staff

Staff's recommendations are contained in Amended Exhibit 12, and are essentially as follows:

The Commission should authorize an outside vendor to develop an actual mileage zip code based distance table. DT 8 would be canceled upon the effective date of the actual mileage DT, with the new guide effective approximately one year from the date of Commission approval. The actual mileage DT would be accepted by the Commission as its own after public hearing. All carriers providing transportation subject to a DT would be required to participate in the new DT, or to obtain authority to use some other procedure. Those holding authorities from the Commission to deviate from DT 8 would be allowed to continue such authorities without obtaining renewals thereto.

Under the staff proposal the vendor would receive no direct compensation from the Commission. Rather, the vendor would be compensated for preparation and updating of the DT book, disk and maps through sale of these documents to users of the new DT. The vendor would submit for Commission approval, a table of fees to be charged to subscribers to the DT. Information submitted for Commission consideration and approval would include (a) pricing of all documents to be approved by the Commission; (b) vendor's records relating to the sale of these documents, subject to audit by the Commission; and (c) estimated costs to be incurred in the development and preparation of the DT. Any change in the price of the documents would be subject to approval by the Commission.

The principal reasons for the staff recommendations are, as stated in Amended Exhibit 12, that "the actual mile format could be more simply updated and maintained than a constructive mileage guide" and that "actual miles will reflect true road measurements without the need for subjectively determined cost factors to be built into the system."

In summary, staff recommends that a vendor provide an actual mileage guide, using postal zip code origin and destination points for the entire state. Staff believes the actual mile format could be more simply updated and maintained than a constructive mileage guide. Staff recommends that the following factors be included in the vendor's mileage table:

1. A system based entirely on 5-digit zip codes, with possible inclusion of zip code groups in metropolitan areas or zip code subdivisions in rural areas (thereby minimizing problems associated with very large zip code areas vis-a-vis the present DT basing point system).
2. Identification of zip codes (by reference, e.g., to National Five-Digit Zip Code and Post Office Directory).

3. Updated actual mileages for new highway segments and basing points in use since 1975, including any new or pending Commission-directed adjustments to DT 8.
4. A clearly explained method of maintaining the mileage system to include future new highway segments and basing points.
5. Formats for both a book and low-cost microcomputer system.
6. Format for microcomputer system to compute the shortest distance via multiple points of destination and/or multiple points of origin (split pickup and delivery).
7. State of California Zip Code Map for those users not purchasing the microcomputer system.
8. Estimated revenue and mileage comparisons of the actual mile zip code guide to DT 8.
9. Rules of use.
10. Other comparative tests as may be determined by the staff or vendor.

Staff contemplates that the actual mileage zip code table will be adopted by the Commission as its own DT 9, but that all services, including development, publication and distribution will be performed by the vendor. Once adopted, staff involvement would be limited to review and participation in hearings, if any, on changes to the table proposed by the vendor. Any other party, as now, could request a deviation from the DT, including a variation in mileages, or an entirely different guide. All presently approved deviations from the existing DT could continue without further approval until their expiration, if any. Adoption of the new DT would necessitate rate increases by common carriers and increases in minimum rate tariffs sufficient to offset reductions from conversions to actual miles. Staff recommends that any new mileage guide be made effective about one year after Commission

approval to allow users adequate preparation time for the conversion of constructive to actual miles.

Staff has excluded from Amended Exhibit 12 its original recommendation that the vendor be a collective ratemaking body, believing that if the Commission is the issuer all prospective vendors may participate, regardless of whether they are an authorized collective ratemaker.

Right now, staff is simply looking to the Commission to authorize an RFP to prospective vendors to establish an actual mileage guide on a zip code basis.

Staff refers us to the testimony of Joseph Harrison, President of HGCB, to support its position that the motor carrier industry nationwide generally uses actual miles for distance rates. This testimony is found in Volume 5 of the transcript, pages 516 and 603:

"...at the present time we publish a nationwide mileage guide that is used by the entire transportation community, contract common carriers, pipelines, railroads."

"...for the past 50 years the Bureau has published a nationwide mileage guide that contains city-to-city specific mileages. . . . The point-to-point cities show the actual miles."

Further hearings are contemplated by the staff for the purpose of determining the precise increases to be ordered after actual mileages are developed. Staff also expects that when the DT is adopted, with the Commission being the issuer, that parties could come to the Commission requesting changes in mileages because of changed highway conditions.

Staff conceded that whether there will be changes authorized based upon petitions, will depend upon the RFP contract. Whether users would purchase the DT from the contractor or from the Commission, is one of the details to be addressed later. However, staff expects that the contractor would be responsible for

publishing the document, even though the Commission's name will be shown as the issuer thereof. It anticipates that a system similar to the one used in connection with adoption of the National Motor Freight Classification will be used in connection with the DT, insofar as payment for the document is concerned, i.e. carriers would be required to purchase the document from the selected vendor.

CMSA

CMSA notes that the staff, through its amended Exhibit 12, recommends that constructive mileage be abolished and replaced with actual mileage, although on many transportation movements performed under adverse physical conditions, minimum rates based on actual mileage will not adequately compensate carriers for the added costs they will experience.

The reasons given by the staff, CMSA states, are stated in Exhibit 12, page 3:

"The staff believes the actual mile format could be more simply updated and maintained than a constructive mileage guide. Actual miles will reflect true road measurements without the need for subjectively determined cost factors to be built into the system."

CMSA asserts that these are not adequate and convincing reasons for eliminating a critical component of cost in the determination of minimum rates. CMSA argues that it would be unfair to have the same rate apply to two 54 mile hauls, one from South San Francisco to Vallejo, the second from Manteca to Merced. The first example involves heavily congested roadways with two toll bridges and up to three hours travel time; the second is all freeway with no grades or congestion, involving less than one-half the travel time with substantially reduced running and labor costs. CMSA insists that before the conversion to actual miles takes place, there should be some evidence on the result of such a radical change; that such evidence is conspicuously absent from the record. It believes that

DT 8 should be retained on a constructive mileage basis, with maps and governing rules, until such time as some alternative constructive mileage format can be developed and be the subject of separate hearings to determine feasibility and the assurance of just and reasonable minimum rates for household goods transportation.

CMSA points out that the staff has offered no probative evidence which would justify elimination of the current constructive mileage distance table, while other parties have offered evidence supporting the continued use of DT 8. For example, CMSA refers us to Exhibit 15, sponsored by Rocky Mountain Motor Tariff Bureau, Inc., where the following statement appears:

"The threshold question then becomes whether constructive or actual miles should be used. The current distance table, which is based on constructive mileage, represents a long-standing governing publication with regard to determining distance rates. It takes into account operational realities in providing service between any two points, e.g., how much time is required to travel between the points and how much fuel is consumed. Absent more detailed reasons, RMB has reservations as to what could be gained by moving to an actual mileage-based Distance Table, which cannot take those operational realities into account."

Further,

"It should also be noted that the proposal by the Staff for the Commission to abandon its traditional role in the development and maintenance of the constructive mileage system is certainly without precedence. The current constructive mileage system, while in need of adjustment, does provide a system that mirrors the realities of motor carrier operations. It is difficult to conceive an actual mileage based system that would provide such detail and not force segments of the market to cross subsidize other segments. It would also disrupt a system that has become a standard that has been generally accepted by the marketplace and replace it with a system

that would cause varied impacts upon individual segments of the marketplace. Only by adding complicated features (such as arbitraries or add-on factors) could such a system be modified to more closely approximate the current system. Because a significant need has not been demonstrated for such a system, it would appear unwise to throw the marketplace into a state of chaos merely to implement such a proposal."

CMSA contends that present MRT 4-C rates were found just, reasonable and nondiscriminatory by D.87-01-066 and D.87-09-045, premised upon use of DT 8; that to abandon their use without substantial supporting evidence would amount to the confiscation of property and constitute unlawful, arbitrary and capricious action by the Commission.

However, CMSA has no objection to the development of a zip code oriented DT format maintained on a constructive mileage basis, noting that such a system has already been developed by Viking and authorized by D.86-12-073. Such format, CMSA professes, meets the specifications desired by the staff and has minimum, if any, revenue impact. CMSA suggests that the Viking format and other carrier zip code based constructive mileage systems be verified and if they work as well as it initially appeared, similar systems be adopted for use with the Commission's MRTs.

CMSA notes that several prospective vendors have testified that no difficulties would be anticipated in the development and maintenance of a zip code system based on constructive mileage, and also testified that use of actual miles does not address the real world.

On the question of whether to use an outside vendor, CMSA observes that it is unknown at this time if it is more cost effective to employ such a method. It refers us to the staff testimony that a study is underway to determine the anticipated staff cost to update DT 8 with the use of constructive miles. CMSA states that the prospective vendors appearing in this proceeding

did so under the belief that they would be compensated for the development and maintenance of the DT through sale of the document as a copyright publication. However, it notes that the staff has apparently changed its original position and the publication will apparently be issued by the Commission itself, so that there will be no vendor copyright. CMSA suggests that the staff should complete its study to determine anticipated costs for the staff to update and maintain the DT, and then outside vendors could be asked to provide cost bids for performing the same task. The vendor would need to be compensated directly by the Commission, CMSA observes, since, without a copyright, the publication could be freely copied and distributed by any entrepreneur and the vendor could not depend upon sales as its means of compensation. It believes that authorization of an RFP would be premature, since the Commission would not know what it was authorizing, why it was being authorized, or whether it would result in a greater or lesser cost to the Commission and the industry who will be using the DT.

CMSA believes that there is a substantial question regarding whether, and to what extent, collective ratemaking agreements will be required to implement the RFP concept suggested by the staff. § 496 provides limited antitrust immunity for approved collective agreements entered into by two or more common carriers relating to rates, rules, divisions, etc. It does not apply to "related businesses" described in Division 2 of the Public Utilities (PU) Code, such as household goods carriers, livestock carriers and dump truck carriers. These latter carriers are prohibited by law from engaging in collective ratemaking agreements, except under certain "State Action" procedures.

Prospective vendors, such as Rocky Mountain Motor Tariff Bureau and Household Goods Carriers Bureau, in anticipation of Commission approval of the RFP concept, have already filed applications seeking approval of collective ratemaking agreements which they feel will be necessary to implement staff's

recommendations. They visualize carrier and shipper initiated changes and modifications in the DT as a collective activity. CMSA maintains that the 1,400 household goods carriers and over 8,000 dump truck carriers operating within California would be necessarily excluded from such activity, since for them it would be unlawful.

CMSA asserts that the staff's recommendation to eliminate the requirement for a RFP vendor to be a collective ratemaking body is not based on any legal opinion, and that the facts of record are insufficient to determine whether collective ratemaking authority will be required. CMSA argues that the State Action exception to application of the antitrust laws is an extremely complex and evolving body of law; that based on this record, it is impossible to ascertain whether staff oversight will be sufficient to avoid antitrust implications by shippers and/or carriers who have no antitrust immunity. According to the testimony, CMSA states, the vendor would not be directly subject to the Commission's jurisdiction, but would be an independent entity. In this connection it calls our attention to the comments of the HGCB:

"In such situations, the federal antitrust laws cannot be ignored. In particular, the immunity conferred under the State Action and Noerr-Pennington doctrines must be carefully considered.

"The Federal courts have found that collective activity is permissible if it is taken pursuant to state action. See Parker v. Brown (1943) 317 U.S. 341 and California Retail Liquor Dealers Ass'n. v. Midcal (1980) 445 U.S. 97. The prerequisite for immunity from antitrust prosecution under the State Action Doctrine is that there be a clearly articulated state policy and active state supervision of the

1 Eastern R.R. Pres. v. Noerr Motor Freight (1961) 365 U.S. 127, U.M.W. v. Pennington (1965) 381 U.S. 657.

involved activity. These tests are applied on a case-by-case basis and as the case law continues to evolve new questions are being constantly raised. For example, in Consol. Gas Co. of Fla. v. City Gas Co. of Fla., 665 F. Supp. 1493 (S.D. Fla. 1987), a federal court recently stated that "...in situations where a regulated firm submits tariffs to an agency, and the tariffs take effect unless the agency disapproves them, Parker immunity will not lie." 665 F. Supp. at 15311. Under the Amended Staff Report it is not at all clear whether the vendor would even be an entity regulated by the California PUC. If not, the State's jurisdiction over the vendor as it would relate to the clearly articulated state policy and active supervision test presents difficult antitrust questions."

* * *

"Elimination of the requirement that the vendor be a ratemaking body subject to the jurisdiction of the California Commission also poses a question under the Noerr-Pennington doctrine."

CMSA maintains that nowhere on this record do we find a "clearly articulated state policy." Further, it asks whether future oversight intent amounts to "active state supervision of the involved activity." It questions the wisdom of the Commission's adopting a proposal without knowledge of potential antitrust implications.

Concerning the issue of record references about the use of actual miles by the motor carrier industry, CMSA believes such statement, contained in Amended Exhibit 12, to be erroneous. It refers us to Exhibit 15, page 2, Footnote 1, which indicates that most ZIP Code-based rate scales are not even predicated on distance relationships.

In summary, CMSA recommends that the ALJ prepare a decision which resolves the actual vs. constructive mileage question and also the question whether to move to a zip code

oriented DT system. It argues that only after those issues are resolved will it be timely to determine whether to use the RFP process, develop RFP standards, resolve § 496 questions of antitrust immunity and other major issues.

Counsel for CMSA asked that official notice be taken of a report entitled "Analysis of the 1987-1988 Budget Bill Report of the Legislative Analyst to the Joint Legislative Budget Committee," and of the 1987-1988 Budget Perspective and Issues, which is a report of the California Legislative Analyst, Joint Legislative Budget Committee. The reports indicate that the Commission appropriation for the regulation of rates provides for 126 positions in the Transportation Division solely for rate control, and an appropriation of almost \$11 million. The implication by CMSA here is that the staff should be able to develop its own DT within this appropriation.

CTA

CTA supports conversion of the DT to a zip code-oriented format, provided distances continue to be measured in constructive miles. It believes that constructive mileages are computer compatible, and much more nearly reflect highway conditions and can readily be adapted for electronic billing. CTA emphasizes that constructive miles give effect to actual physical highway conditions such as grades, curves, traffic congestion, bridge tolls, etc., which would not be considered if distances are shown in actual miles.

CTA asserts that although no policy determination has been made by the Commission to abandon DT 8, the staff is acting as though such a policy has been set, thereby placing the "cart before the horse." CTA believes choosing a vendor is secondary to the question of how mileages will be reflected in a new DT. It notes that during the course of the hearing a number of prospective vendors offered to provide their services for development and maintenance of a new DT, and while some were involved in tariff

publication with little experience in mileage determination, others had just the opposite expertise. CTA asserts that a successful vendor must be able to produce the end product, and must have financial stability; that it would be folly to engage a vendor and have it go out of business not long thereafter.

CTA contends that the existing DT is an integral part of existing tariffs, having an effect on a great portion of the industry. It insists that the only way the requirements of § 496 can be bypassed is for the vendor to prepare and publish the DT in the Commission's name, or by the Commission continuing to publish the DT. CTA poses the following questions which it believes need to be addressed in connection with PU Code § 496:

1. Whether all carriers must be governed by the vendor DT, or whether individual carriers may establish their own mileage guides.
2. Whether there will be more than one authorized DT.
3. How the vendor is to be reimbursed. For example, will all carriers be required to join the vendor's "bureau" and pay its cost, or will financing be provided by use of Transportation Rate Fund fees?
4. Whether the vendor will be liable for errors in the DT.
5. Whether it will be up to the vendor to keep the DT current, and how changes in mileages will be handled, e.g.,
 - a. Will the vendor have to file a formal application for every mileage change?
 - b. Can changes be requested by individuals?

CTA states the copyright issues cannot be settled until it is determined whether the mileage guide is to be issued by the vendor or by the Commission.

Concerning the issue of conversion to zip codes from metropolitan zones, CTA notes that only the three major metropolitan areas (San Francisco Bay Area, Los Angeles and San Diego) have metropolitan zones, while the entire state is zip coded. It points out that some zip codes, particularly those east of the Sierra Nevada Mountains, are long and narrow and extend for many miles, and questions how mileages are to be determined to these coded areas.

Staff Amended Exhibit 12 contains the statement: "The motor carrier industry nationwide generally uses actual miles and is adopting and converting to postal zip code based distance tables." CTA maintains that this is incorrect; that interstate class rates are based on a system of mileage basing points, and that distances for ratemaking purposes between those basing points depend on calculations of the cost of traveling from one basing point to another, much like California's system of constructive miles. Further, CTA asserts, most interstate rates are point-to-point commodity rates. It contends that the calculation of costs between these points includes many of the same factors considered in establishing California's constructive miles, i.e. volume and frequency, availability of return loads, and applicability of arbitrary rates to off-route points. CTA concedes that the Household Goods Mileage Guide lists actual miles between its mileage basing points, but believes that guide would not serve as a practical DT for intrastate traffic because it lacks a reference to distances between all intrastate points. It professes that most general freight carriers using this guide do so to determine operating miles in only limited instances, rather than for general ratemaking purposes.

CTA argues, in summary, that the staff is recommending, without direction from the Commission or consultation with the industry, that it discontinue development and maintenance of the DT, and that traditional engineered constructive miles be replaced with actual miles - on the basis of the erroneous assumption that interstate rates are based on actual miles and that actual miles are more conducive to computer application than constructive miles.

Con-Way

Con-Way urges that if a zip code DT is adopted, its use be optional, allowing carriers such as Con-Way to continue to use their own zip code tables which have been authorized by the Commission. It states that both Con-Way and shippers rely upon Con-Way's Mileage Guide 100-A as an efficient means to determine rates. The carrier asserts it would increase costs for both it and shippers if they were required to convert from the current Mileage Guide 100-A to the model zip code table.

Con-Way suggests that in deciding whether to use an outside vendor to develop an RFP, the Commission must first determine whether staff or an outside vendor can more efficiently develop and maintain the DT.

Con-Way does not favor a conversion to actual miles because actual miles do not consider the various highway characteristics discussed herein.

HGCC

HGCCB represents that it is the principal compiler and publisher of distance mileage guides in the United States. Its distance guides are used as governing publications for ratemaking purposes by motor common and contract carriers of property and passengers, pipelines, freight forwarders, and railroads, having application to both interstate and intrastate commerce.

The Bureau asserts that the determination of mileages between locations, whether based on constructive or actual miles, is essentially a mechanical process. It professes that it has been

publishing nationwide mileage guides for the transportation community for the past 50 years, and possesses the experience and expertise to develop and publish a California intrastate DT based on either constructive or actual miles. It presently publishes four mileage guides containing rules, maps, actual miles, zip codes, and standard point location codes. HGCB takes no position on the question of whether to adopt an actual mileage, or retain the constructive mileage concept, but urges that the Commission act in a manner to insure that California carriers not be adversely affected.

HGCB notes that there is ample evidence that a new DT can be converted to a zip code basis based on constructive or actual miles, and that a computerized version, as well as a paper version can be developed.

HGCB believes that a vendor approach to the compilation and maintenance of a DT is appropriate because it will provide the Commission with opportunity to use the experience and expertise of organizations that have devoted considerable resources to the development of such guides. It contends that by using a vendor the Commission can efficiently and economically achieve its goal of providing California carriers and shippers with an updated DT based on 5-digit zip codes, available in both hard copy and computer formats.

The bureau emphasizes that there is no clear-cut answer to the questions surrounding PU Code § 496. For this reason, it argues that the vendor should operate pursuant to an agreement approved under § 496. It maintains that Federal and state antitrust laws are broadly written, referring to Section 1 of the Sherman Act, 15 U.S.C. Section 1, which provides that "Every contract, combination... or conspiracy in restraint of trade or commerce...is hereby declared to be illegal." HGCB states that the Supreme Court has determined that the statute cannot be read literally and has limited its application to unreasonable

restraints United States v. Joint Traffic Association (1898) 171 U.S. 505. Unfortunately, the bureau notes, a "reasonable" standard creates uncertainty because what is reasonable to one judge or jury may not be considered reasonable by another forum.

HGCB emphasizes that defenses to allegations of unlawful conduct that may be based on the State Action or the Noerr-Pennington doctrines do not resolve the question of whether antitrust immunity exists if the Commission issues and a vendor develops and updates the DT. It points out that these two areas of antitrust law are constantly evolving and are affected by new court precedent. The bureau refers us to the granting by the United States Supreme Court of a writ of certiorari in Indianhead, Inc. v. Allied Tube & Conduit Corp., 817 F. 2d 938 (2nd Cir. 1987), to consider again the Noerr-Pennington defense. The case involves attempts to influence the National Fire Protection Association in its production of the National Electrical Code which is adopted by various governmental bodies as part of their building and construction ordinances. HGCB believes that the Indianhead situation is not far removed from the relationship of a vendor and carriers, shippers and receivers who may attempt to influence the construction of an accurate mileage guide. It also refers us to another recent United States Supreme Court grant of a writ of certiorari in Patrick v. Buirget, 800 F. 2d 1498 (9th Cir. 1986) to again consider the State Action defense.

Another recent case, the bureau states, highlights the potential for scrutiny and attack presented by activities that are the product of actions of private parties (i.e. vendor) and government instrumentalities - Washington State Elec. Contractor v. Forrest, 839 F. 2d 547 (9th Cir. 1988). There, private litigants sued the State of Washington Department of Labor and Industries, the individual members of the Washington State Apprenticeship and Training Council and others for antitrust damages, injunctive and declaratory relief. In this case the Ninth Circuit observed:

"The legislative actions of a state legislature or supreme court do not require extensive scrutiny to determine whether they are guided by an articulated and express state policy or are conducted under the supervision of the state because such actions constitute 'those of the State' itself. 466 U.S. at 567-568, 104 S. Ct. at 1995. Such scrutiny, however, is required when agents of the state rather than the state itself conduct anticompetitive activities." (839 F. 2d 551.)

HGCB advises that while the defendants in this case ultimately prevailed under the State Action defense, it was only after years of costly litigation.

HGCB submits that the absence of an immunized process approved under § 496 will be detrimental to the development, submission and promulgation of the new DT, because while distances are not rates, distances directly affect many rates. It maintains that when an activity becomes aligned with the sensitive area of pricing, careful consideration must be given to antitrust laws. It contends that Commission established procedures under which shippers and carriers can openly discuss and agree upon the contents of a California DT will facilitate this process, and therefore urges that the vendor selected be authorized to operate under an agreement approved pursuant to § 496.

HGCB professes that on interstate, as well as most intrastate traffic, motor carrier distance rates are governed by tariffs that contain actual, rather than constructed miles. However, it believes it is important to note that carriers who base their rates on actual distances are specialized, or truckload carriers, and not less-than-truckload carriers. HGCB maintains that of 30,000 plus interstate certificated carriers operating in the United States, the preponderance base some or all of their rates on actual distances. However, it states that less-than-truckload carriers generally use the rate basis approach to identifying rates between points. Thus, with the exception of

less-than-truckload carriers of general commodities, the bureau notes, carriers on a nationwide basis use actual distances in the development of rates.

TMC

TMC favors a mileage guide based on actual miles, and observes that since a change to actual miles may require an adjustment in rates, a change to actual miles should be subject to further hearings. TMC also favors a zip code oriented format, maintaining that economies in rating and auditing of freight bills can thus be achieved. However, the Conference shares the concerns of others over the large geographic areas included in some zip code zones.

TMC believes the RFP vendor approach is preferable to continuance of the present staff responsibility, observing that, for whatever reasons, staff has been unable to issue a complete and updated DT for over 10 years. It suggests that as part of the bid process, prospective vendors be required to submit sample maps and tables representative of their product.

The Conference contends that the successful vendor should possess § 496 authority, even though the DT would be on an actual mileage basis. Further, it believes that the selected vendor's bureau agreement should include a provision that docket meetings be held in California, considering this particularly important since two prospective vendors, Rocky Mountain Tariff Bureau and HGCB, are headquartered in Colorado and Virginia, respectively. Finally, TMC recommends that the successful vendor be required to conduct workshops to demonstrate the new DT.

Viking

Viking is the first general commodities less-than-truckload carrier in California to receive authority from this Commission to use a statewide, five digit zip code based DT, as authorized by D.86-12-073. The carrier strenuously objects to any attempts to convert the DT to an actual mileage basis as a result

of these proceedings. It asserts that the current system of motor carrier pricing has evolved over many years, based upon constructive mileages; that to arbitrarily replace the foundation of this system would radically upset the entire process, requiring major adjustments to compensate therefor. Viking contends that the constructive mileage system eliminates the need for additional factors to be applied in the determination of freight rates. It maintains that without constructive mileages, carriers would be required to introduce additional factors, such as bridge toll arbitraries, additional charges for heavily congested areas, or deliveries in remote mountainous locations, or else provide across the board adjustments, resulting in the non-affected segments cross-subsidizing affected segments.

Viking observes that since it has been more than 12 years since any adjustments have been made to the current DT, the mileages used as a basis for current carrier pricing serve more as a point of reference, rather than strictly relating to an actual distance and the cost associated with performing service for that specific distance. It professes that very little less-than-truckload traffic nationwide is priced based on actual miles; that while such may have been the case 40 years ago, the rate basis between two locations has become less well defined over the years. Viking points out that most rate structures for interstate traffic published by the various rate bureaus throughout the country use rate basis numbers, providing a relative reference rather than an absolute mileage reference. And, especially with the conversion of many nationwide tariffs to a zip code basis, it believes the relationship to actual miles has become even more vague.

Viking argues that there are no advantages to using the RFP process for developing the next DT; nor does it see the need to continue the present system which requires extensive work by engineers and experts in order to adjust mileages between each point affected by the opening of a new highway segment. Rather,

the carrier suggests that the function would be most appropriately returned to the carriers within their own ratemaking procedures. It emphasizes that a five digit zip code based guide would not be appropriate for all carriers; but for those where such a DT is appropriate, filing a tariff individually, as done by a few, including Viking, or through the rate bureaus they participate in under § 496 would be the best vehicle for accomplishing such changes. In summary, Viking is ready to assist the Commission in the development of a new DT, one zip code based and retaining its relationship to the current constructive mileage based DT. But it would not welcome a complete revision to the current system by using an actual mileage base, nor wish to deal with an outside vendor. It stresses that too much emphasis is placed on the minute detail of each individual mileage segment within the state, and that carriers should be given the flexibility and authority to assume responsibility for their own livelihoods.

Willig

Willig maintains that the constructive mileage format has been satisfactory for many years, and should not be abolished. It professes that several of the major tariff bureaus publish rates based on the rate group system, without any direct relationship to miles. Further, it contends that motor carrier rates historically have been based on the rate group system whereby principal points throughout the state would be assigned as rate base points, and the surrounding points referenced to that rate base point. Willig urges that the Commission adopt a zip code distance table based on constructive rather than actual miles, to mirror the existing DT 8. The carrier suggests that Viking's DT would provide the California motor carrier industry with a viable vehicle for conversion to zip code constructive mileages, and asserts that with the existence of such a statewide five digit zip code based DT based on constructive miles there would be no need for use of the RFP procedure. It urges that the next DT be published by the Commission, with the

staff entering into a contract with a reliable bureau to perform such functions as providing updated information, book format and a microcomputer system, thus avoiding any conflict with PU Code § 496.

Leon Carrington, a transportation consultant and prospective mileage table contractor, recommended (Exhibit 32) that the present DT be retained with a zip code option as an alternative concurrent DT. He notes that there is a public sector mileage compilation maintained by the California Department of Transportation, which is updated annually. He believes that document could be readily configured to provide DT 8 type information. Carrington urges that if a private contractor is offered the opportunity to furnish a computerized device, all such vendors be allowed to do so, asserting that the RFP approach intrudes on a viable competitive, open market opportunity which should be fair game for all prospective contractors. He asserts that a copyright applied to the basic compilation would preclude all but a single distance determination device vendor from having open access to the source material.

Philipp Davies, a transportation consultant, suggests that the present format be retained, with updated maps and rules. He believes that the staff is adequately staffed to continue the necessary updating of mileage segments.

Discussion

After consideration, we believe it will be in the best interests of the industry if a DT is adopted on a zip code oriented, actual mileage basis.

The principal problem involved in the conversion to a zip code oriented guide has been dealt with in earlier proceedings involving Con-Way and Viking, among others, and presented no insurmountable barrier to the statewide use of zip codes in the calculation of distances. That problem involves a few long and wide zip code areas in remoter parts of the state. Such large

extended areas may contain a great many points of origin or destination, called basing points in DT 8. Each basing point has, in turn, its own extended area. Incorporated cities have extended areas of three miles; unincorporated communities have extended areas of only one mile.

To illustrate, a shipment from Los Angeles to Lone Pine, located in Inyo County, takes the applicable rate for 229 miles under tariffs naming mileage rates based on DT 8. A shipment to a point not as far as Lone Pine along the same route of movement would take a lower rate. But under the zip code basis, all points located within a single zip code area would take the same mileage rates.

We recognized these differences when we authorized Viking and others to use the zip code area format (D.86-12-073, supra). We believe that the same facts would apply to transportation performed on an industry-wide basis. We expect that the same minimal differences in revenues would obtain. This is because these larger zip code areas are located in remote parts of the state where relatively little freight originates or is destined. The use of sub-zones can be applied in these situations. Adoption of the zip code area basing point system for purposes of this proceeding will provide a reasonable method for determining mileages for use in connection with applicable rate tariffs.

There are differences of opinion among the parties on the question of whether to adopt a DT based on actual or constructive miles. Four of the parties - CMSA, CTA, Viking, and Willig urge that a constructive mileage format be retained. Staff and TMC favor the conversion to actual miles. HGCB takes no position on this issue, but stresses that it has the expertise to develop a mileage guide based on either actual or constructive miles. It also observes that on a nationwide interstate basis, as well as within most states, it is a fact that motor carrier distance rates are based on actual, rather than constructive miles. The Bureau,

nevertheless, is mindful of the relationship now existing in California between constructive mileages, carrier costs and just and reasonable rates. It urges that whatever our decision on this issue, we act in a manner that insures that California motor carriers will not be adversely affected. In other words, the Bureau is urging that if we adopt the staff recommendation on this issue, we do so in its entirety, ordering increases in appropriate rate tariffs to insure that current revenue levels are not reduced by the conversion to actual miles.

For many years we have published distance rates in the statewide dump truck tariff, MRT 7-A, based on actual miles; and we also published actual mileage rates in MRT 15, the vehicle unit tariff. We are aware of no particularly difficult problems experienced in connection with the determination of charges under either of those tariffs. It is apparent that an actual mileage format will take considerably less time and effort to develop and update, and thus be less costly than one based on constructive miles. This lower cost will be reflected in the final cost to users of the document, and should be a factor in our decision on this issue.

In I.88-08-046 we are considering new procedures involving our regulation of general freight. We expect very soon to undertake consideration of new procedures in connection with our regulation of other segments of the transportation industry. To the extent distance rates have applied in our minimum rate tariffs, constructive miles have played an integral part of that regulation. However, it is apparent that constructive miles are not nearly so important a consideration in the pricing systems we have adopted in our regulation of general freight, where rate reductions through individual cost justifications, the rate window opportunity, etc. apply. In these situations, as one of the parties stated in Phase I of this proceeding, "...the carefully developed and maintained distance rate relationships are no longer required in

non-minimum rate environments; it is the management decision-making process which is now paramount." Under these conditions, particularly in the case of general freight transportation, we cannot overlook the fact that the DT is little more than a table of rate bases which guide a tariff user to a proper scale of rates.

In summary on this issue, the faster development and updating, as well as the lower final cost of the actual miles format, combined with the considerations mentioned above concerning the newer role of the DT as a table of rate bases, persuade us to adopt an actual miles DT. One other factor, that relating to antitrust issues, merits consideration here. We agree with staff that an actual miles document will require less collective participation by shippers and carriers, and be less apt to become entangled in the continually evolving and complex antitrust issues discussed in this decision. We will authorize development of an actual miles table, and will consider during the course of further hearings prior to its adoption the amounts of rate increases in the appropriate tariffs necessary to offset the revenue reductions resulting from the conversion to actual miles.

The new format DT can best be accomplished if undertaken by a contractor through the RFP bid process. The Transportation Division staff is already involved in many proceedings imposing rigorous demands upon its personnel. The staff will be better able to deal with those important proceedings if it is not required to commit personnel to an extensive and costly overhaul of DT-8. If this activity can be performed by a vendor, it will alleviate the pressures on an already overstretched staff. We believe there are experienced parties available with sufficient expertise to perform this function.

Section 1 of the Sherman Act states "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal..." (15 U.S.C.

Section 1.) Section 16700, et seq. of the California Business and Professions Code contains a generally comparable statute applicable in connection with California intrastate commerce.

The activity we are authorizing in this decision will be permissible, and will not violate applicable antitrust laws, if undertaken by a vendor within the framework of the guidelines set forth in Parker v. Brown (supra) and Southern Motor Carriers Rate Conference v. U.S. (1985) 471 U.S. 48. These decisions generally require active state oversight of a clearly articulated state policy. The Commission's affirmative involvement under the scenario recommended by the staff and set forth in Appendix A will satisfy the basic state action tests prescribed in those decisions. This is especially true if performed under the actual mileage format we are adopting here, because we expect that participation by carriers and shippers in the determination of actual miles will be negligible prior to public proceedings involving approval of changes in mileages and rules which must be authorized by the Commission. The contractor will be essentially an objective assembler and publisher of actual miles, unburdened by the need to consider subjective conditions. Such conditions can be adequately taken into account by individual carriers, as they are by carriers involved in dump truck distance rate transportation and in the interstate transportation of used household goods. We concur with staff that if the Commission is the actual issuer of the DT, and the vendor only the assembler and publisher of the document, no need will exist for the vendor to have PU Code § 496 authority. Such authority would extend, in any event, only to activities involving common carriers, and not to those of the many thousands of highway permit carriers who will use the mileage guide.

The program we are authorizing will entail use by the industry of a document which, while developed by a contractor, will be considered in the public sector because it will be actually issued, after approval, by the Commission. In the negotiations

which will be undertaken by the authority we are granting here, prospective contractors and the staff should give adequate consideration to the various copyright issues which may be involved. This will be important because, while each highway carrier will be required to use the adopted DT, since the Commission will be the issuer, the DT will be considered in the public domain and not copyrightable by the vendor. Pricing of the developed DT will be strongly influenced by its ultimate total "sell" to the industry.

In summary, it will be our policy, as soon as practical, that highway carriers under our jurisdiction be governed by a mileage guide based on a zip code oriented, actual mileage format, developed and maintained by a contractor, in which the Commission will have active oversight with respect to approval of changes in mileages and rules. Further hearings will be held in this proceeding after the selection of the contractor and the development of the DT. At that time we will consider approval of the DT, including applicable rules, the amounts of increases necessary in the appropriate tariffs to offset reductions in revenues which may be measured, revisions of decisions and general orders required to mandate use of the document by all appropriate highway carriers, and any other issues necessary in order to implement use of the adopted DT. The format and conditions set forth in Appendix A will provide the bases for consideration by the staff and parties in the determination of the selected contractor.

In accordance with Public Utilities Code Section 311, as amended by Assembly Bill 3383, the ALJ's proposed decision was mailed to appearances on November 4, 1988. No comments were filed in response to the proposed decision.

Findings of Fact

1. DT 8 contains a table of distances, expressed as constructive miles, between points in California.
2. Constructive miles are greater than actual miles between the same points, because constructive miles give effect to such highway conditions as grades, curvatures, average speeds, congestion and bridge tolls.

3. Constructive mileage determinations have been made by Commission staff personnel for several decades. The mileages apply in connection with distance rates named in MRTs 3-A, 4-C and certain rates in MRT 7-A, and with transportation subject to GOS 147-A, 149, 150-A, and 151.

4. Individual carriers have been authorized to publish constructive mileage guides on a zip code area basis.

5. Staff recommends that it no longer develop and maintain the applicable mileage guide because of resource limitations and the need for its involvement in other activities. It also recommends that an outside vendor be authorized to develop an appropriate distance table on a U. S. Postal Zip Code, actual mileage basis.

6. PU Code § 496 affords anti-trust immunity to rate bureaus formed for the purpose of establishing agreements among common carriers. Highway carriers other than common carriers are not afforded immunity under this provision.

7. Under the state action doctrine set forth in Parker v. Brown (317 U.S. 341) highway carriers will enjoy anti-trust immunity if an outside vendor develops and maintains a mileage guide for use by the motor carrier industry, provided the Commission has complete oversight over the development of the guide and any changes thereto, and is the actual issuer of the document.

8. A mileage guide based on actual miles will be easier and less costly to develop and maintain than a guide based on constructive miles.

9. If DT 8 is replaced with a mileage guide based on actual miles, revenues calculated under tariffs using the actual mileages will be reduced.

10. Staff and other parties recommend that if an actual mileage guide is adopted, rates in tariffs using the new guide be mandatorily increased to offset the resultant reductions in revenues.

11. Adoption of a zip code oriented, actual mileage based DT will provide a reasonable method for determining mileages for use in connection with applicable rate tariffs and schedules.

Conclusions of Law

1. The present procedure, under which the staff develops and maintains the applicable DT should be discontinued. This function should in the future be performed by an outside contractor, with miles developed on a zip code oriented, actual mileage basis.

2. Staff should be authorized to enter into a RFP bid process with prospective contractors for the purpose of developing and maintaining a mileage guide consistent with the format outlined in Appendix A of this decision.

3. Use of the DT ultimately adopted in accordance with this decision should be required by all highway carriers operating under economic regulation by this Commission, except those carriers having permission to use DTs otherwise authorized.

INTERIM ORDER

. IT IS ORDERED that:

1. The Commission's Transportation Division staff is authorized to solicit bids for the purpose of selecting a contractor to develop and maintain an actual mileage, zip code oriented distance table, in accordance with the format described in Appendix A of this decision, through the Request for Proposal process set forth in the State Administrative Manual.

2. Further hearings will be held after selection of the contractor on the remaining issues addressed in this decision.

This order becomes effective 30 days from today.

Dated DEC 9 1988, at San Francisco, California.

STANLEY W. HULETT
President

DONALD VIAL

FREDERICK R. DUDA

G. MITCHELL WILK

JOHN B. OHANIAN
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.

[Signature]
Vice President, Executive Director

AB

APPENDIX A

CONDITIONS OF CONSTRUCTION AND USE OF DISTANCE TABLE TO BE DEVELOPED BY VENDOR SELECTED IN ACCORDANCE WITH THIS DECISION

1. DT shall be an actual mileage, zip code oriented document.
2. Contractor shall be responsible for development of actual miles and applicable rules, and changes thereto, and for publication and mailing of the document.
3. Carriers currently holding authorities to depart from provisions of DT 8 will be allowed to continue using authorized documents; other carriers may obtain similar authorities.
4. Contractor will receive compensation from subscriptions to DT.
5. Commission shall be actual issuer of the DT.
6. DT will not be effective until approved by the Commission. Future changes in rules and mileages may not be effective until approved by Commission.
7. The DT shall be based entirely on 5-digit zip codes, with possible inclusion of zip code groups in metropolitan areas and zip code subdivisions in rural areas.
8. DT shall include mileages for new highway segments and basing points established since 1975.
9. Contractor shall furnish a clearly explained method for maintaining the mileage system to include new future highway segments and basing points.
10. Contractor shall submit a format for both a mileage table and a low-cost microcomputer system, and a format for a microcomputer system to compute the shortest mileages via multiple points of origin and/or destination.
11. The DT shall include a State of California Zip Code map for users not purchasing the microcomputer system.
12. Contractors shall submit for Commission approval, a table of fees to be charged to subscribers, as well as estimated costs to be incurred in the development and issuance of the DT.

(END OF APPENDIX A)

which will be undertaken by the authority we are granting here, prospective contractors and the staff should give adequate consideration to the various copyright issues which may be involved. This will be important because, while each highway carrier will be required to use the adopted DT, since the Commission will be the issuer, the DT will be considered in the public domain and not copyrightable by the vendor. Pricing of the developed DT will be strongly influenced by its ultimate total "sell" to the industry.

In summary, it will be our policy, as soon as practical, that highway carriers under our jurisdiction be governed by a mileage guide based on a zip code oriented, actual mileage format, developed and maintained by a contractor, in which the Commission will have active oversight with respect to approval of changes in mileages and rules. Further hearings will be held in this proceeding after the selection of the contractor and the development of the DT. At that time we will consider approval of the DT, including applicable rules, the amounts of increases necessary in the appropriate tariffs to offset reductions in revenues which may be measured, revisions of decisions and general orders required to mandate use of the document by all appropriate highway carriers, and any other issues necessary in order to implement use of the adopted DT. The format and conditions set forth in Appendix A will provide the bases for consideration by the staff and parties in the determination of the selected contractor.

Findings of Fact

1. DT 8 contains a table of distances, expressed as constructive miles, between points in California.
2. Constructive miles are greater than actual miles between the same points, because constructive miles give effect to such highway conditions as grades, curvatures, average speeds, congestion and bridge tolls.